

SERVICE DATE — LATE RELEASE AUGUST 30, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36195

NEW JERSEY TRANSIT CORPORATION—ACQUISITION EXEMPTION—
CONSOLIDATED RAIL CORPORATION IN THE COUNTY OF MIDDLESEX, N.J.

Digest:¹ The New Jersey Transit Corporation (NJ Transit) does not need Board authorization to acquire a portion of rail line known as the Delco Industrial Lead in Middlesex County, New Jersey. The seller, Consolidated Rail Corporation, will retain the legal obligation and ability to provide freight rail service and NJ Transit will not be able to interfere unreasonably with that service.

Decided: August 30, 2018

In this decision, the Board grants the motion of the New Jersey Transit Corporation (NJ Transit) to dismiss its notice of exemption filed in this proceeding. The Board finds that 49 U.S.C. § 10901 does not apply to this sale of real property and railroad assets associated with a rail line to a state agency, because the selling rail carrier will retain an exclusive, perpetual freight rail operating easement to fulfill its freight rail common carrier obligations on the rail line, and the purchaser will not be able to unduly interfere with freight rail service.

BACKGROUND

On May 21, 2018, NJ Transit, an instrumentality of the State of New Jersey and a noncarrier, filed a verified notice of exemption under 49 C.F.R. § 1150.31 to acquire from Consolidated Rail Corporation (Conrail) the property commonly known as the Delco Industrial Lead in Middlesex County, N.J., from milepost 33.1 to milepost 36.4 (the Line).²

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Notice of the exemption was served and published in the Federal Register on June 6, 2018 (83 Fed. Reg. 26,338).

Simultaneously, NJ Transit filed a motion to dismiss the notice, asserting that because Conrail would retain a perpetual, exclusive freight rail operating easement and NJ Transit would not acquire any rights or obligations that would prevent Conrail from fulfilling its common carrier obligations, the transaction does not require Board authorization under 49 U.S.C. § 10901. The motion is unopposed.

NJ Transit explains that operations on the Line (and other lines not part of this transaction) are already governed by a 1984 Trackage Rights Agreement between NJ Transit, New Jersey Transit Rail Operations, Inc.,³ and Conrail. (Notice 1-2.)⁴ Accompanying its verified notice of exemption, NJ Transit filed excerpts from the 1984 Trackage Rights Agreement; the Ninth Supplemental Agreement to the Trackage Rights Agreement; the Agreement of Sale between Conrail and NJ Transit; and the Quitclaim Deed between Conrail and NJ Transit. The Quitclaim Deed transfers Conrail's interests in the tracks, land, and other rail property of the Line to NJ Transit, but reserves to Conrail a permanent, perpetual, exclusive, transferable, and irrevocable easement to operate freight service on the Line. (Mot. 2; Notice, Ex. 5.) The Ninth Supplemental Agreement references and modifies the 1984 Trackage Rights Agreement, which will continue to govern the operating rights of NJ Transit and Conrail.

NJ Transit states that it is acquiring the underlying real estate and physical assets of the Line for use in its commuter operations. (Notice 2.) It intends to construct new passenger rail facilities, tracks, storage tracks, and related railroad infrastructure. (Notice, Ex. 3.) Because Conrail will retain an exclusive, perpetual, transferable, assignable, and irrevocable freight rail operating easement, NJ Transit asserts that the transaction does not involve the transfer of the common carrier obligation. NJ Transit also asserts that its ownership of the Line will not interfere with, or in any way impair, Conrail's ability to provide freight rail service on the Line. (Motion 1-2.) Accordingly, NJ Transit argues that, under Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C. 2d 835 (1991), and Board precedent, including previous acquisitions of rail property by NJ Transit,⁵ its acquisition of the underlying real estate and the physical assets of the Line does not require Board authorization under 49 U.S.C. § 10901, and the notice of exemption should be dismissed.

³ According to the parties' documents, New Jersey Transit Rail Operations, Inc., is NJ Transit's operating subsidiary. (Notice, Ex. 3, at 4.)

⁴ NJ Transit also notes that Conrail retained an easement for its freight operations on certain NJ Transit-owned tracks. (Mot. 3 n.3.)

⁵ See N.J. Transit Corp.—Acquis. Exemption—Certain Assets of Conrail, 4 S.T.B. 512 (2000); N.J. Transit Corp.—Acquis. Exemption—Norfolk S. Ry. (N.J. Transit 2013), FD 35638 (STB served Mar. 27, 2013).

DISCUSSION AND CONCLUSIONS

The question at issue is whether the Board's regulatory authority is required for NJ Transit to acquire the underlying real estate and the physical assets of the Line, where Conrail retains a permanent, exclusive, and irrevocable freight easement to conduct freight rail operations. The acquisition of an active rail line, and the common carrier obligation that goes with it, ordinarily requires Board approval under 49 U.S.C. § 10901, even if the acquiring entity, including a state, is a noncarrier. See Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). But when the selling carrier retains an exclusive, permanent easement to permit it to continue to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligations, the Board (and its predecessor agency, the Interstate Commerce Commission (ICC)) typically has found that agency authorization is not required and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See State of Maine, 8 I.C.C. 2d at 836-37; State of Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry. (Mich. DOT), FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc. (Mass. DOT), FD 35312, slip op. at 6 (STB served May 3, 2010) aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

Under State of Maine, the key question is whether the transaction agreements give the new owner of the physical railroad assets the ability to prevent the rail carrier that retains the freight operating easement from meeting its common carrier obligations on the line. N.J. Transit 2013 slip op at 3; Mass. DOT, slip op. at 8. In making this determination, the Board looks to whether the rail carrier will retain (1) a permanent, irrevocable, and exclusive freight rail operating easement, and (2) sufficient control over the line to permit it to carry out its common carrier obligations. Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of Pan Am S. LLC, FD 35943, slip op. at 4 (STB served Dec. 4, 2015).

In this case, the Quitclaim Deed reserves for Conrail “a permanent, perpetual, exclusive, transferable, assignable and irrevocable” easement for freight service, subject to the 1984 Trackage Rights Agreements. (Notice, Ex. 5.) The transaction will not cause Conrail to transfer its common carrier obligation or permit NJ Transit to hold itself out as providing freight service. (Id.) This aspect of the State of Maine inquiry is satisfied.

To determine whether there are any impediments to the continuation of common carrier freight service by the rail carrier on the assets being transferred to the new owner, the Board examines the relevant agreements. The Board also examines whether the new owner is acquiring an amount of control over common carrier freight rail operations on the line that would rise to the level of constituting an acquisition of a “railroad line” under 49 U.S.C. § 10901(a)(4). See Port

of Seattle—Acquis. Exemption—Certain Assets of BNSF Ry., FD 35128, slip op. at 3 (STB served Oct. 27, 2008).

Under the parties' agreements, NJ Transit is assuming dispatching rights and maintenance obligations for passenger and freight rail service over the Line in furtherance of commuter rail service. The Board has previously held that, under State of Maine, placing control of dispatching and maintenance in the hands of the acquiring noncarrier may be allowed when there is a legitimate business justification. See N.J. Transit 2013, slip op. at 3; San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R., FD 35225, slip op. at 5 (STB served June 23, 2011) (denying request where proponent did not provide a legitimate business justification); Fla. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110, slip op. at 10 (STB served Dec. 15, 2010). Here, NJ Transit's dispatching rights and maintenance obligations will be governed by the 1984 Trackage Rights Agreement, which precludes the transit agency from unreasonably interfering with Conrail's ability to provide service. (Notice, Ex. 2 at Sec. 3.01.) That agreement has allowed for the successful joint use of tracks by NJ Transit and Conrail for over 30 years. (Mot. 6-7.) The Board found in N.J. Transit 2013 that the acquisition involving the 1984 Trackage Rights Agreement and its division of responsibilities was consistent with State of Maine, and there is no reason to find otherwise here. N.J. Transit 2013 slip op. at 4.

Under the Ninth Supplemental Agreement, NJ Transit also can remove inactive turnouts on the Line. Pursuant to that agreement, upon Conrail's approval, NJ Transit shall remove turnouts that do not serve existing customers. (Notice, Ex. 3 at Sec. 4.) The agreement also provides for the replacement or installation of new turnouts that Conrail may need for future customers. (Id.) Because the arrangements are structured to allow Conrail to fulfill its common carrier obligations, these provisions are consistent with State of Maine.

In sum, as in N.J. Transit 2013, the Board concludes that the proposed transaction is consistent with State of Maine and that the acquisition of the underlying real estate and physical track assets of the Line by NJ Transit under the terms proposed here does not amount to the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4). See N.J. Transit 2013 slip op. at 5. Because Conrail will retain a permanent, irrevocable, and exclusive freight easement, and the terms of the agreements with NJ Transit protect Conrail against undue interference with its common carrier freight rail obligations, the proposed transaction will not cause NJ Transit to become a rail carrier. Under these circumstances, the proposed transaction does not require Board authorization under 49 U.S.C. § 10901. The Board will grant NJ Transit's motion, dismiss its notice of exemption, and terminate this proceeding.

It is ordered:

1. NJ Transit's motion to dismiss the verified notice of exemption is granted.

2. The proceeding is terminated.
3. This decision will be effective on its service date.

By the Board, Board Members Begeman and Miller.